



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, D.C. 20224

OFFICE OF  
CHIEF COUNSEL

December 1, 2006

Number: **INFO 2006-0097**

Release Date: 12/29/2006

UIL: 9999.98-00

CONEX-153497-06

The Honorable John Ensign  
United States Senator  
333 Las Vegas Boulevard, South  
Suite 8203  
Las Vegas, Nevada 89101

Attention:

Dear Senator Ensign:

This letter is in response to your inquiry to the \_\_\_\_\_ dated \_\_\_\_\_, on behalf of your constituent, \_\_\_\_\_. He requested a recalculation of his liability for taxes under the Federal Insurance Contributions Act (FICA) on amounts deferred under a nonqualified deferred compensation plan because his employer terminated the plan. The \_\_\_\_\_ forwarded your request to our office.

Although I sympathize with \_\_\_\_\_ situation, the FICA taxes imposed on amounts deferred under a nonqualified deferred compensation arrangement are not refundable just because benefits are never ultimately distributed as a result of plan termination. A nonqualified deferred compensation plan is an arrangement between an employer and an employee to pay the employee compensation in the future. Nonqualified deferred compensation plans are generally unfunded arrangements whereby the employer's promise to pay the deferred compensation benefits in the future is not secured in any manner. Therefore, amounts deferred are subject to claims by the employer's creditors. Thus, the risk that an employee may not receive any benefits in the future is an inherent feature of nonqualified deferred compensation plans.

The law imposes FICA tax on the wages paid by employers to employees for employment [Sections 3101 and 3111 of the Internal Revenue Code (Code)]. Generally, an employer must withhold and pay FICA tax on compensation deferred according to a nonqualified deferred compensation plan at the later of:

- When the employee performs the services that create the right to a deferral; or
- When a substantial risk that the employee's rights to the deferred amounts will be forfeited no longer exists [Section 3121(v)(2)(A) of the Code].

Nonqualified deferred compensation arrangements can be either account balance plans or nonaccount balance plans. A nonaccount balance plan, such as the plan participated in, does not credit deferred amounts to particular participants' individual accounts [Employment Tax Regulation § 31.3121(v)(2)-1(c)(1)(i)]. If a nonqualified deferred compensation plan is a nonaccount balance plan, a special rule permits an employer to delay withholding and paying FICA taxes until the amount deferred is "reasonably ascertainable" [Employment Tax Regulation § 31.3121(v)(2)-1(e)(4)(A)].

The law considers amounts deferred under nonaccount balance plans reasonably ascertainable on the first date the employer knows the amount, form, and beginning date of the benefits, so he or she can compute their present value. When the present value of a benefit becomes reasonably ascertainable, the present value amount is subject to FICA tax [Employment Tax Regulation § 31.3121(v)(2)-1(d)(2)(C)(2)(ii)]. Under some nonaccount balance plans, retirement benefits do not become reasonably ascertainable until retirement. The present value calculation does not consider the probability that an employer will not make payments because of the unfunded status of the plan, the risk associated with any deemed or actual investment of the amounts deferred under the plan, or similar risks or contingencies [Employment Tax Regulation § 31.3121(v)(2)-1(c)(2)(ii)].

I am sorry my response is not more favorable, but I hope this information is helpful. If you have any questions, please contact me or \_\_\_\_\_ at ( ) .

Sincerely,

Lynne A. Camillo  
Chief, Employment Tax Branch 2  
Office of the Associate Chief  
Counsel/Division Counsel  
Tax Exempt & Government Entities